

MORGAN LOEBEL)	
Claimant)	
VS.)	
)	Docket No. 1,035,795
HEUMANN & ASSOCIATES)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY COMPANY)	
Insurance Carrier)	

¹ This transcript was labeled as a Regular Hearing Transcript, but it appears to be a transcript of a preliminary hearing.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order Denying Temporary Partial Compensation should remain in full force and effect and the appeal filed by claimant in this matter should be dismissed.

Claimant alleges the ALJ exceeded his jurisdiction in denying claimant temporary partial disability compensation after the ALJ determined that claimant's injuries were limited to scheduled injuries under K.S.A. 44-510d(b). Claimant argues that his pain extends from the right shoulder into the right elbow and wrist and also that he has pain in the left shoulder. Claimant then goes on to argue that it cannot be determined at this time whether claimant's injuries are scheduled or extend into the whole body. But the only body parts testified to by claimant are limited to his upper extremities. Under K.S.A. 44-510d, these body parts are contained in the scheduled injury statute. The fact that there are multiple parts would only allow for possible multiple scheduled injury awards, and not a whole body award. Therefore, claimant's argument that a whole body award is still possible is not supported by this record.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.²

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.³

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁴

K.S.A. 44-510e(a) states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be

² K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

³ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁴ K.S.A. 2007 Supp. 44-501(a).

settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be $66\frac{2}{3}\%$ of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by $66\frac{2}{3}\%$ or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was

paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

K.S.A. 44-510d(b) states:

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

There is no question the ALJ has the authority to entertain an award for TPD under K.S.A. 44-510e. However, that is only the case if the award is not covered by K.S.A. 44-510d, the scheduled injury statute. Here, the record seems clear that claimant's injuries are covered by K.S.A. 44-510d and, therefore, claimant is precluded from an award of TPD.⁵

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

⁵ *Ledbetter v. Constar Plastics*, No. 205,252, 1996 WL 670520 (Kan. WCAB Oct. 2, 1996); and *Mitchell v. Wal-Mart*, No. 264,567, 2001 WL 893620 (Kan. WCAB July 27, 2001).

3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

The term “certain defenses” refers to disputes over the compensability of the injury under the Workers Compensation Act.⁷ Moreover, the Board can review allegations that an administrative law judge has exceeded his or her jurisdiction.⁸ Here, the ALJ had the jurisdiction to determine, for preliminary hearing purposes, whether claimant’s injuries entitled him to TPD. The ALJ found claimant did not qualify under the statute. The issue whether a worker satisfies the definition of being temporarily and partially disabled is not a jurisdictional issue listed in K.S.A. 44-534a. Moreover, whether a worker is temporarily and partially disabled is a combined question of law and fact over which an administrative law judge has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁹

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁶ K.S.A. 44-534a(a)(2).

⁷ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

⁸ K.S.A. 2007 Supp. 44-551.

⁹ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

¹⁰ K.S.A. 44-534a.

CONCLUSIONS

The ALJ did not exceed his jurisdiction in determining, for preliminary hearing purposes, whether claimant is temporarily and partially disabled. Therefore, the Order of the ALJ in this matter should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order Denying Temporary Partial Compensation of Administrative Law Judge Brad E. Avery dated February 14, 2008, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2008.

HONORABLE GARY M. KORTE

c: Beth Regier Foerster, Attorney for Claimant
Ronald A. Prichard, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge